1-8-2015

Jay Ordan, Order on Defendants' Motion for Summary Judgment

Elizabeth E. Long
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAY ORDAN,	)	
	)	**Civil Action File No.**
Plaintiff,	)	**2014CV240975**
	)	
v.	)	**Bus 2**
	)	
BRIAN KEEN and HEALTH COOPERATIVE STRATEGIES, LLC,	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On January 5, 2015, the parties appeared before the Court to present oral argument on the Defendants' Motion for Summary Judgment. Upon consideration of the parties' oral arguments, briefs, and the record in this case, the Court finds as follows:

In early 2012, Plaintiff Jay Ordan ("Ordan") and Defendant Brian Keen ("Keen"), the sole owner of Health Cooperative Strategies, LLC, ("HCS"), entered into discussions regarding the business of HCS. HCS helps certain industry associations form and manage health benefit plans for their members under Georgia's Multiple Employer Welfare Association regulations. HCS sought investors and Ordan, as a broker of health care products, had industry connections. In March of 2012, Ordan introduced Keen to Steve Needle, an agent of the McCart Group. The McCart Group eventually invested in HCS. Ordan was paid a finder's fee for this introduction.

Ordan claims that in late June, or early July, 2012, he and Keen verbally agreed that he would receive a 25% equity stake in HCS in exchange for his continuing marketing, sales, and general business services. Keen admits that they discussed Ordan becoming an owner of HCS, but maintains that the two men never agreed to the terms, and argues that even if there was an

agreement to the terms, as Ordan suggests, that Ordan did not uphold his purported end of the agreement. Keen's failure to give Ordan a 25% equity interest is at the heart of his claims. [1]

In support of their positions, the parties cite to several documents created in the following months leading up to March 2013 when Ordan discovered that Keen did not consider him a 25% owner. First, Keen emailed Ordan discussing compensation on July 2, 2012, "per our conversation." The email discussed a commission structure, but did not mention a 25% ownership interest.

Next, during July and August 2012, HCS and the McCart Group negotiated a Memorandum of Understanding that defined the relationship of the companies and finalized the McCart Group's investment. The final executed Memorandum of Understanding dated August 29, 2012, states, "Jay Ordan will contribute sales oversight, support and creative direction to HCS and the services of Ken Southerland as the COO of this enterprise as part of his contribution." Ordan testified that he acted on behalf of HCS seeking investors, handling marketing and advertising, and as a partner consulting on all business matters. He contends he performed this work for HCS relying on Keen's promise of 25% equity. Southerland also began performing duties on behalf of HCS. Ordan testified that Ken Southerland initially had a limited role in HCS. He was tasked with getting the company records in working order, which, Ordan claims, included putting together the operating agreement. In exchange for Southerland's services, Ordan states he promised Southerland a 5% ownership interest in HCS out of his 25% interest.

[1] The counts are as follows: Count 1 – Declaratory Judgment; Count 2 – Breach of Contract; Count 3 – Quantum Meruit (In the alternate to Breach of Contract); Count 4 – Fraud; Count 5 – Breach of Duty to Allow Access to Company Records in Violation of O.C.G.A. § 14-11-313; Count 6 – Punitive Damages; Count 8 – Attorney's Fees and Costs of Litigation. Count 7 for failure to pay minimum wage was voluntarily dismissed.

Finally, from September 21, 2012 to October 31, 2012, multiple drafts of an operating agreement were created by an attorney procured by Southerland. The drafts list Keith Ordan, Ordan's son and intended beneficiary, as having an equity interest in HCS varying from 20% to 26.7%. They also show Ken Southerland holding a 5% ownership stake in HCS. The operating agreements were never executed, and the parties dispute the extent of Keen's knowledge of these drafts.

In performing the work for HCS, Ordan maintained office space with other HCS executives in the McCart Group offices. The internal phone directory assigned an HCS designation to Ordan similar to the other HCS principals. Third parties have also provided affidavits that Keen and another equity investor referred to Ordan as an equity partner.

Defendants move for summary judgment on all counts. A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. *Lau's Corp., Inc. v. Haskins*, 261 Ga. 491, 491 (1991). "On summary judgment, after the movant makes a prima facie showing of its entitlement to judgment as a matter of law, the burden then shifts to the respondent to come forward with rebuttal evidence." *L.D.F. Family Farm, Inc. v. Charterbank*, 326 Ga. App. 361, 362 (2014) (citations omitted).

As an initial matter, Plaintiff's Counsel, at oral argument, advised the Court that Ordan would not be pursuing his claim for declaratory judgment because he no longer considers himself a member of HCS. Accordingly, Count 1 for Declaratory Judgment is hereby **DISMISSED WITHOUT PREJUDICE**.

Additionally, since Ordan is not a current member of HCS, he does not have standing to seek relief under O.C.G.A. § 14-11-313. Therefore, summary judgment as to Count 5, Breach of Duty to Allow Access to Company Records, is hereby **GRANTED**.

I. Breach of Contract

Defendants argue that no oral contract was formed because there is no evidence of mutual assent to the terms, the terms were too indefinite to be enforced, and there was a failure of consideration. However, each of these arguments fail because the evidence indicates there is a dispute of fact as to the formation of an oral contract.

"Georgia law recognizes that an oral contract falling outside the purview of the Statute of Frauds may be binding and enforceable." *Turner Broad. Sys. v. McDavid*, 303 Ga. App. 593, 596 (2010). "To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1.

> In determining whether there was a mutual assent, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestation or assent, or that meaning which the other contracting party knew the first party ascribed to his manifestation of assent. Further, in cases such as this one, the circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement. Where such extrinsic evidence exists and is disputed, the question of whether a party has assented to the contract is generally a matter for the jury.

Turner Broad. Sys., 303 Ga. App at 597. "Where there is a conflict in evidence as to the existence of an oral contract or as to its terms, the matter must be submitted to a jury for resolution." *Fay v. Custom One Homes, LLC*, 276 Ga. App. 188, 190 (2005).

Here, Ordan has presented sufficient evidence of mutual assent to create a genuine issue of material fact to be decided by a jury. Although the July 2 email did not mention a 25% equity

interest, Ordan has testified that Keen orally promised him a 25% ownership interest in HCS in exchange for his continuing management role. Although Keen disputes any agreement was reached, he does admit that they discussed Ordan becoming an owner. Additionally, Ordan has presented affidavits of third parties who claim that Keen held Ordan out as an equity partner. Therefore, the evidence of record shows that the circumstances surrounding the making of this contract could support a determination by the jury that mutual assent existed.

Further, although Defendants' contend the terms are too indefinite for a contract to have formed, "the law does not favor the destruction of contracts on grounds of uncertainty." *Kitchen v. Insuaramerica Corp.*, 296 Ga. App. 739, 743 (2009). "[A]n indefinite contract...may acquire more precision and become enforceable because of the subsequent words or actions of the parties." *Id.* at 602-03. Here there is evidence suggesting that Keen and HCS held Ordan out as an equity owner to third parties, that Ordan was provided HCS office space and an HCS phone extension, and that Ordan provided his own services to HCS as well as the services of Southerland as outlined in the Memorandum of Understanding between McCart and Keen. On the other hand, the size of Ordan's equity interest is unclear—25%, 20%, or somewhere between 20% and 26.7%. A jury issue remains as to the terms of any oral contract between the parties.

Finally, Defendants' contend there is a failure of consideration for two reasons. First, Defendants argue that at the time of the alleged oral agreement, Ordan did not make a return promise and the finder's fee was his compensation for work already performed. Second, Defendants argue that if Ordan did give a return promise, it was to provide the services of Ken Southerland, and Defendants' state Ordan never compensated Southerland. However, Ordan presents evidence of additional work for HCS beyond finding McCart as an investor for which he admits he received a finder's fee. It is this work he claims was performed in exchange for a

25% equity interest. Additionally, Ordan contends the compensation agreed to by Ken Southerland was, in part, 20% of his 25% equity.

The facts asserted by both parties as to the formation of an oral contract are contested and therefore, summary judgment as to Count 2 for Breach of Contract is hereby **DENIED.**

II. Quantum Meruit

Defendants next argue that Ordan's quantum meruit claim cannot survive summary judgment for the same reasons they argue consideration is not present; Ordan was paid a finder's fee and he never paid for Ken Southerland's services. However, Ordan contends he provided more to HCS than the introduction of the McCart Group and states he would be compensating Southerland by giving him a 5% equity interest in HCS.

"A claim of unjust enrichment will lie if there is no legal contract and 'the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.'" *Jones v. White*, 311 Ga. App. 822, 827 (2011) (quoting *Smith v. McClung*, 215 Ga. App. 786, 789(3) (1994)). The evidence of record shows there are disputes of fact as to the formation of a contract and the services provided by Ordan. A jury could find that no contract was formed, but that Ordan performed valuable services for HCS for which he should be compensated for under a quantum meruit theory. Therefore, summary judgment as to Count 3 for Quantum Meruit is hereby **DENIED.**

III. Fraud, Punitive Damages, and Attorney's Fees.

Defendants next argue that Ordan's fraud claim fails because he has not established a false representation by Keen, Keen's intention to induce Ordan's reliance, or Ordan's justifiable reliance. "To survive a motion for summary judgment in an action for fraud..., a plaintiff must come forward with some evidence from which a jury could find each of the following elements,

false representation; scienter; intent to induce the party claiming fraud to act or refrain from acting; justifiable reliance; and damage proximately caused by the representation." *JarAllah.v Schoen et al.*, 243 Ga. App. 402, 403-04 (2000).

Here, Ordan contends that he was promised 25% equity and he relied on this promise by continuing to work for HCS. As previously discussed, the evidence could support a finding that Keen promised Ordan equity. However, a disputed promise alone with no evidence of scienter or present intent not to perform the promise is insufficient to create a fraud claim. "[T]he general rule is that actionable fraud cannot be predicated upon promises to perform some act in the future." *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga App. 552, 558 (2007) (quoting *Hamilton v. Advance Leasing, etc.*, 208 Ga App. 848, 850(2) (1993)) (affirming grant of summary judgment on fraud claim). "Nor does actionable fraud result from a mere failure to perform promises made. Otherwise any breach of a contract would amount to fraud." *Id.* The exception to the general rule is "where a promise as to future events is made with a present intent not to perform." *Id.* at 559 (finding that vague, equivocal, self-serving, conclusory evidence is insufficient evidence of present intent not to perform); *see also Pacrim Assoc. v. Turner Home Entertainment, Inc.*, 235 Ga App 761, 767 (1998) (affirming summary judgment on fraud claim because plaintiff did not present any evidence of defendant's intent not to comply with promise at the time when the promise was made to make plaintiff exclusive licensing agent). Here, there is no evidence that Keen made promises to Ordan with a present intent not to fulfill them. Therefore, summary judgment as to Count 4 for Fraud is hereby **GRANTED.**

Since the fraud claim cannot stand, summary judgment as to Count 6 for Punitive Damages is hereby **GRANTED.**

Further, since recovery is still possible on multiple claims, summary judgment as to Count 8 for Attorney's Fees and Costs is hereby **DENIED.**

So ORDERED this 8th day of January, 2015.

Elizabeth E. Long

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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